IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1686

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

The brief for the National Labor Relations Board argues that the decision below, insofar as it held that it was unlawful for petitioner to picket to obtain deck officer jobs for its members,

> "simply followed a long line of cases holding that a labor organization violates Section 8(b)(1)(B) of the Act when it strikes, pickets, or engages in other coercive conduct in order to induce an employer

> to select bargaining or grievance adjustment representatives whom it does not want, or to forego representation by representatives of its own choosing." (NLRB Br. 9, footnote omitted.)

The cases cited in support of this proposition (*id.* at n.3), however, all involved efforts by a union which represented an employer's "employees" to influence or control the employer's labor-relations policies by dictating the choice of the representatives through whom the employer formulated or implemented such policies. This case presents a quite different situation. The union here did not represent or seek to represent the "employees" of the employers involved. Nor was it interested in influencing or controlling the employers' labor-relations policies toward their employees. Its interest, rather, was in obtaining employment for its own members, who are "supervisors" within the meaning of the Act. None of the cases relied on by the Board even address the question of whether Section 8(b)(1)(B) is applicable in such a situation.

The Board also asserts that the decision below on this issue is "in accord with the legislative history of the Act." (NLRB Br. 9.) We respectfully disagree. As Judge Bazelon stated in the only previous case which has presented this issue:

> "The Board's decision in this case restricts the power of supervisors to resort to self-help—a power that Congress intended them to retain—so long as they belong to a union containing statutory employees and so long as their positions involve collective bargaining or grievance adjustment functions. In effect, it places a tax on supervisors' right to remain members of employee unions, a right that Section 14(a) specifically preserves.
>
> "I find nothing in the legislative history of Section 8(b)(1)(B) to support, or even favor, a conclusion that Congress intended it so to restrict supervisors' rights. On the contrary, the legislative history makes

> clear that Congress was concerned with an entirely different problem. The Section was intended to prevent efforts by *employee unions* to coerce employers into choosing, as collective bargaining and grievance adjustment representatives, persons sympathetic to the union's rank-and-file members, rather than persons loyal to the employer. Consistently with this purpose, the Board has extended the Section to include employee union attempts, by discipline or otherwise, to force its supervisor members to perform collective bargaining or grievance adjustment functions in a manner favorable to the union. Before this case, however, the Board has never attempted to apply Section 8(b)(1)(B) to a union that neither represented, nor aspired to represent, the employer's rank-and-file employees. And the reason for this is clear: in such circumstances, the purpose that Congress intended the Section to achieve is simply not implicated." *International Organization of Masters, Mates and Pilots* v. *NLRB*, 486 F.2d 1271, 1277-78 (D.C. Cir. 1973) (dissenting opinion), *cert. denied*, 416 U.S. 956 (1974). (Emphasis in original; footnotes omitted.)

To be sure, this was a dissenting opinion, but it is certainly more persuasive than the Board's *ipse dixit*. Moreover, we believe Judge Bazelon's reading of the legislative history is supported by this Court's subsequent decision in *Florida Power & Light Co.* v. *International B'hd of Elec. Workers*, 417 U.S. 790 (1974).* In any event, the question of whether Section 8(b)(1)(B) was intended to limit the

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* Both the Board and the other respondents argue that *Florida Power* involved different facts and a different issue than this case. We have never contended, of course, that the facts of *Florida Power* were similar to the facts of the present case, nor have we contended that the issues in the two cases are the same. What we do contend is that the result reached in the present case—albeit on different facts and a different issue—is inconsistent with this Court's analysis in *Florida Power* of the meaning and purpose of Section 8(b)(1)(B). None of the respondents has answered this argument.

power of supervisors to engage in concerted activities for their own mutual aid and protection is certainly not settled, as the Board's brief suggests. We submit that this question is of sufficient importance to warrant plenary consideration by this Court.

II.

As we pointed out in the petition, the decision below did not merely hold that the picketing in this case was unlawful only insofar as it sought to force the employers to hire petitioner's members as deck officers. It also held that the picketing was unlawful insofar as its purposes were (1) to secure recognition of petitioner as the bargaining representative of the employers' deck officers, (2) to obtain a collective bargaining agreement covering such deck officers, and (3) to induce the employers to apply to their deck officers the terms and conditions of employment which prevail under petitioner's collective bargaining agreements with other employers. The Board's brief attempts in various ways to suggest that these aspects of the decision are tied to the particular facts of this case, but it is clear that the decision is not so limited.

First, the Board argues that because "collective agreements in this industry typically provide that the employer will hire only members of the contracting union . . ., the employers would have been required to replace all the MEBA officers if MMP had succeeded in obtaining a contract covering the licensed deck officers on these vessels." (NLRB Br. 12.) The Board's order, however, does not merely prohibit MMP from picketing for a contract which would require the employers to hire MMP members. It prohibits picketing for *any* contract, including a contract which would permit the employers to retain their existing complement of deck officers. (Pet. 25a-26a.) The order even prohibits MMP from picketing merely to obtain recognition as the collective bargaining representative of

such desk officers, or to induce the employers to apply to those deck officers the terms and conditions of employment which MMP has established in its contracts with other employers. (*Ibid.*)

MMP would obviously have an interest in obtaining recognition and a collective bargaining agreement even if it could not require the employers to hire its members, since one of its principal concerns in this case was to prevent these employers from undercutting the labor standards which MMP has established through years of collective bargaining in this industry. The decision in this case prohibits it from pursuing even this limited goal.

The Board also argues that "MMP's picketing for any or all of the proscribed objects would coerce the employers in the selection of their Section 8(b)(1)(B) representatives by warning them not to select any persons except those who would work on MMP's terms." (NLRB Br. 12.) This argument, of course, would be equally applicable in *any* situation in which MMP might use peaceful economic pressure against *any* employer to obtain *any* concession with respect to the wages, hours and working conditions of deck officers. If Section 8(b)(1)(B) were to be construed that broadly, MMP would be utterly unable to function effectively as a union representing deck officers.

The Board also argues that the decision in this case would not affect picketing with respect to supervisors "who do not possess grievance-adjustment or collective-bargaining authority." (NLRB Br. 13.) This argument, however, hardly narrows the scope of the Board's holding in this case, since virtually every supervisor has at least *some* grievance-handling responsibilities. Moreover, the Board has sometimes held that even a supervisor who has never performed grievance handling is entitled to the protection of Section 8(b)(1)(B) since he may be required to do so in the future. E.g., *Toledo Locals Nos. 15-P and 272 (Toledo Blade Co.)*, 175 N.L.R.B. 1072, 1078-79

(1969), *enforced*, 437 F.2d 55 (6th Cir. 1971); *Detroit Newspaper Printing Pressmen's Union (Detroit Free Press)*, 192 N.L.R.B. 106, 110 (1971). The clear trend of Board decisions is to hold that all supervisors are covered by Section 8(b)(1)(B).

Finally, the Board asserts that the present decision "does not preclude a union from, for example, picketing to urge higher wages for supervisors it already represents." (NLRB Br. 13.) This argument is disingenuous, for the decision of both the Board (Pet.App. 24a) and the court below (Pet.App. 14a) specifically relied upon a case in which the Board squarely held that a union *had* violated Section 8(b)(1)(B) by "picketing to urge higher wages for [a supervisor] it already represent[ed]." *Sheet Metal Workers Local 17 (George Koch Sons, Inc.)*, 199 N.L.R.B. 166 (1972), *enforced*, 502 F.2d 1159 (1st Cir. 1973), *cert. denied*, 416 U.S. 904 (1974). The employer in that case had a contract with the union which covered both employees and certain supervisors. In direct violation of that agreement, the employer had paid a particular supervisor less than the contractual wage rate, had refused to pay him overtime, and had also failed to make certain welfare and pension contributions required by the contract. When the union discovered these infractions, it fined the supervisor (who was a union member) for acquiescing in the contract violations, and it struck the employer to compel him to make the wage and other payments required by the contract. The Board held that both the fine and the strike violated Section 8(b)(1)(B):

> "If an employer is to be free from union coercion in the selection of persons who are to serve the employer as its representatives, then surely the employer must be free from union coercion in the matter of setting the terms of such representatives' employment. Thus, to fine one who agrees to serve as an employer's representative solely because he and the employer agreed upon terms and conditions of em-

> ployment which the union may find objectionable must necessarily have an inhibiting effect—and indeed a coercive effect —on the employer in his future selection of representatives . . . .
>
> " . . . . We think it equally clear that the work stoppages which were initiated by Respondent were for the purpose of requiring Koch to accede to the union-dictated terms and conditions of Ziltener's employment and thus coerced the Employer in the same manner as the fines levied on Ziltener himself, and we find such conduct on the part of the Union also to be violative of Section 8(b)(1)(B)." 199 N.L.R.B. at 167-68.

The reliance of both the Board and the court below on the above case demonstrates that the present decision is not narrowly limited to its particular facts, as the Board's brief suggests. Rather, it represents an interpretation of Section 8(b)(1)(B) which effectively prohibits virtually any concerted activities by or on behalf of supervisors. We submit that this reading of the statute is inconsistent both with its language and its legislative history, as well as with this Court's own interpretation of it in *Florida Power*, *supra*. In any event, the ramifications of the decision in this case are so far-reaching as to merit review by this Court.

CONCLUSION

For the reasons stated above and in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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